No. 15,135

IN THE

United States Court of Appeals

For the Ninth Circuit

WOODROW W. REYNOLDS, on behalf of himself and all other taxpayers similarly situated,

Appellant,

vs.

HUGH WADE, as Treasurer of the Territory of Alaska, JOHN MCKINNEY as Director of Finance of the Territory of Alaska, DON M. DAFOE as Commissioner of Education of Alaska, and A. H. ZIEGLER, WILLIAM WHITEHEAD, MRS. JAMES MARCH, MRS. MYRA RANK and ROBERT F. BALDWIN as Members of the Board of Education of the Territory of Alaska,

Appellees.

BRIEF FOR APPELLEES.

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BRIEF FOR APPELLEES.

OPINION BELOW.

The two opinions of the District Court are set forth in the Transcript of Record (R. 15, R. 29), the principal opinion being also reported at 139 F. Supp. 171.

JURISDICTION.

The jurisdiction of the District Court rests on the Act of June 6, 1900, 31 Stat. 322, as amended, 48 U.S.C., Section 101; the jurisdiction of this Court rests on Section 1291 of the new Federal Judicial Code.

BASIC QUESTION PRESENTED.

Whether an Alaskan taxpayer as such, has standing to challenge the constitutionality of a Territorial statute authorizing the expenditure of Territorial funds when he *failed to allege* that as a result of the enforcement thereof he suffered a direct "legal injury" different from that suffered by the generality of taxpayers.

SECONDARY QUESTION PRESENTED.

May the District Court, in its discretion, award attorney's fees to the Territory as the successful litigant?

STATUTES INVOLVED.

The pertinent statutes are printed in the appendix.

STATEMENT.

The 1955 Territorial Legislature enacted Chapter 39, Session Laws of Alaska, 1955, which authorizes the expenditure of Territorial Funds for the trans-

portation of school children, "* * * who, in compliance with the compulsory education laws of Alaska, attend non-public schools * * * where such children, in order to reach such non-public schools, must travel distances comparable with, and over the routes the same as, the distances and routes over which the children attending public schools are transported." Chapter 6, Extraordinary Session Laws of Alaska, 1955, appropriated the funds to carry out Chapter 39.

On November 3, 1955, the appellant, an Alaskan taxpayer, on behalf of himself and all other taxpayers similarly situated, filed suit against various Territorial officials in the District Court, Juneau, Alaska, seeking to enjoin the expenditure of funds, on the alleged ground, among others, that the expenditure therefor violates numerous provisions of the Federal Constitution and Alaska's Organic Act and greatly increases the taxes which appellant and the other taxpayers of Alaska are obliged to pay. On November 18, 1955, the Territory filed a motion requesting the Court to enter an order dismissing the Complaint on the grounds: (1) that it does not state a claim upon which relief can be granted, and (2) that "It does not allege that the plaintiff will suffer any injury that will not be suffered in common by the general public." (R. 13.) After hearing extensive argument by counsel from both sides and considering numerous briefs presented by opposing counsel, the Court, on March 26, 956, rendered and filed its written opinion and decision authorizing the entry of an order granting the Territory's motion to dismiss appellant's

Complaint. (R. 15.) On April 23, 1956, the Court filed another opinion holding that the Territory, like the United States, is entitled to recover attorney's fees. (R. 29.) On April 18, 1956, the Court entered its final judgment and decree ordering that appellant's Complaint be dismissed. (R. 24.) Appellant filed his notice of appeal on May 8, 1956. (R. 26.)

FINAL ISSUES.

I.

Does an Alaskan taxpayer, as such, have standing to challenge the validity of a Territorial statute when he failed to allege that he suffered a direct legal injury different from that suffered by the generality of taxpayers as a result of its enforcement?

II.

May the District Court, in its discretion, award attorney's fees to the Territory of Alaska?

SUMMARY OF ARGUMENT.

Issue I.

Since the appellant, Reynolds, has not alleged that the enforcement of the territorial law threatens a violation of a particular legal right of his own, but on the contrary, has specifically alleged that he is subject to "like injury and damage" as thousands of other Alaskan taxpayers, he has no standing to sue in Alaskan Courts.

Point 1.

Federal Courts are unanimous in holding that a Federal taxpayer, as such, has no standing to question the constitutionality of a Federal expenditure unless he alleges that he has a particular legal right of his own to which "direct injury" is threatened thereby.

(a) Since the appellant has failed to allege a threatened injury to a legal right of his own, there exists no justiciable controversy herein.

(b) Other United States Supreme Court cases.

(c) United States Court of Appeals' decisions.

(d) However, a taxpayer, as such, can maintain an action against a municipality and against certain states, Puerto Rico and Hawaii.

Point 2.

The Mellon rule, commonly called the "Federal rule", has been made binding upon Alaskan Courts.

Point 3.

An analysis of the Complaint herein fails to disclose the existence of any allegation that a particular legal right of the appellant is being threatened with injury by the administration of Chapter 39, SLA 1955 or Chapter 6, Ext. SLA 1955.

Point 4.

Appellant's contention that he, in fact, alleged a direct and special injury to himself, thereby entitling him to sue, is not borne out by the record.

Issue II.

The District Court, in its discretion, may award attorney's fees to a successful litigant and it makes no difference if said litigant be the United States or Territorial government.

Point 1.

By virtue of specific statutory and judicial authority, the Court, in its discretion, may award attorney's fees to a successful litigant.

Point 2.

Appellant's contentions that: (1) the Court, in its discretion, should deny attorney's fees to the Territory, (2) the Territory is not a "party", and (3) defendants are salaried officials and nominal defendants only and hence, not entitled to attorney's fees, are untenable.

Conclusion.

ARGUMENT.

ISSUE I.

SINCE THE APPELLANT, REYNOLDS, HAS NOT ALLEGED THAT THE ENFORCEMENT OF THE TERRITORIAL LAW THREATENS A VIOLATION OF A PARTICULAR LEGAL RIGHT OF HIS OWN, BUT ON THE CONTRARY, HAS SPECIFICALLY ALLEGED THAT HE IS SUBJECT TO "LIKE INJURY AND DAMAGE" AS THOUSANDS OF OTHER ALASKAN TAXPAYERS, HE HAS NO STANDING TO SUE IN ALASKA COURTS.

POINT 1.

FEDERAL COURTS ARE UNANIMOUS IN HOLDING THAT A FEDERAL TAXPAYER, AS SUCH, HAS NO STANDING TO QUESTION THE CONSTITUTIONALITY OF A FEDERAL EXPENDITURE UNLESS HE ALLEGES THAT HE HAS A PARTICULAR LEGAL RIGHT OF HIS OWN TO WHICH "DIRECT INJURY" IS THREATENED THEREBY.

(a) Since the appellant has failed to allege a threatened injury to a legal right of his own, there exists no justiciable controversy herein.

The landmark case on the question of a taxpayer's standing to sue in a case of this nature is *Massachusetts v. Mellon (Frothingham v. Mellon)* (1923), 262 U.S. 447, 67 L. Ed. 1078. There, a taxpayer brought suit challenging the constitutionality of the so-called "Maternity Act." (42 Stat. at Large, 244.) This statute provided for an appropriation to be distributed among the several states for the purpose of reducing infant mortality. It was asserted by the plaintiff-taxpayer that these appropriations were not national but local and they fell unequally upon the several states in that the cost of the program bore more heavily on the industrial states such as Massachusetts. At 262 U.S., page 480, the Supreme Court stated:

> "We have reached the conclusion that the cases must be disposed of for want of jurisdiction, without considering the merits of the constitutional questions."

In holding that the taxpayer had no capacity to maintain the action the Supreme Court laid down the following rule of law which has been unanimously followed and recognized by every Federal decision we have been able to find. At pages 487-489, the Court said:

> "The administration of any statute likely to produce *additional taxation* to be imposed upon a vast number of taxpayers, the extent of whose several liability is indefinite and constantly changing, is essentially a matter of public, and not of individual, concern. If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect to the statute here under review, but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned. The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the conclusion which we have reached, that a suit of this character cannot be maintained. * * * *We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional.* That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. * * *. The party who invokes the power (the power of the courts to nullify acts of the legislature) must

be able to show not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. * * * Looking through forms of words to the substance of their complaint, it is merely that officials of the executive department of the government are executing and will execute an act of Congress asserted to be unconstitutional; and this we are asked to prevent. *To do so would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department,—an authority which plainly we do not possess. * * * dismissed.*" (Cf. *Williams v. Riley,* infra. (Emphasis supplied.)

Thus, it is evident at this point that a statute, the administration of which results in additional taxation, constitutes no legal basis for a taxpayer, as such, to enjoin the same since, as the Supreme Court itself says, that is "a matter of public, and not individual concern".

(b) Other United States Supreme Court cases.

Our research has disclosed that the *Mellon* rule has been expressly followed and otherwise recognized in no less than seventy-two (72) Supreme Court and Federal Circuit Courts of Appeals decisions. A fair cross section of Supreme Court cases are as follows:

In *Alabama Power Co. v. Ickes,* 302 U.S. 464, 478-479, 82 L. Ed. 374, 378, the Court restated the *Mellon* rule in this manner:

"* * * Petitioner alleges that it is a taxpayer; but the interest of a taxpayer in the moneys of the Federal treasury furnishes no basis for an appeal to the preventive powers of a court of equity. Massachusetts v. Mellon, 262 U.S. 447, 486 et seq., 67 L. Ed. 1078, 1084, 43 S. Ct. 597. The principle established by the case just cited is that the courts have no power to consider in isolation and annul an act of Congress on the ground that it is unconstitutional; but may consider that question 'only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act.' The term 'direct injury' is there used in its legal sense, as meaning a wrong which directly results in the violation of a legal right. 'An injury, legally speaking, consists of a wrong done to a person, or, in other words, a violation of his right. It is an ancient maxim, that a damage to one, without an injury in this sense (*damnum absque injuria*), does not lay the foundation of an action; because, if the act complained of does not violate any of his legal rights, it is obvious that he has no cause to complain. * * *.'"

Florida v. Mellon, 273 U.S. 12, 18, 71 L. Ed. 511, 515, held that the State of Florida sustained no direct injury merely because the Federal Inheritance Tax limits that state's base of taxation by affording residents an incentive to move their property from Florida. In *Williams v. Riley,* 280 U.S. 78, 79, 80, 74 L. Ed. 175, a California taxpayer sued to set aside as unconstitutional a statute levying three (3) cents

on each gallon of gasoline sold in that state. The Court at pages 79, 80, pointed out that:

> "Appellants, along with thousands of other citizens and taxpayers of California, operate motor vehicles along the highways. * * * The Federal courts have no power per se to review and annul acts of state legislatures upon the ground that they conflict with the Federal or State Constitution. *'That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act.'*" (Emphasis added.)

Fairchild v. Hughes (1922), 258 U. S. 126, 130, 66 L. Ed. 499, 504, involved a suit to have the Nineteenth Amendment to the Federal Constitution declared unconstitutional on the ground that it could not be made part of the Constitution in that it had not been properly ratified. It was held that the general right possessed by every citizen to require that the Federal Government be administered according to law and that the public monies be not wasted, did not entitle a private citizen, in his capacity as such, or as a taxpayer, to maintain a suit for a determination whether a statute, if passed, or a constitutional amendment about to be adopted, will be valid.

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 95 L. Ed. 817, 842. Here the Court again reaffirmed the general rule by stating:

> "* * * A petitioner does not have standing to sue unless he is 'interested in and affected adversely by the decision' of which he seeks to

> review. His 'interest must be of a personal and not of an official nature.' (Citing cases.) The interest must not be wholly negligible, as that of a taxpayer of the Federal Government is considered to be. (Citing cases.) A litigant must show more than that 'he suffers in some indefinite way in common with people generally.' "

Barrows v. Jackson, 346 U.S. 249, 255, 97 L. Ed. 1586, 1595. In the *Barrows* case, the Court recognized the validity of the *Mellon* rule, but distinguished it on the basis of the facts in that case. In commenting upon the *Mellon* case, the Court, by use of the following language, summarized the holdings of a long line of decisions, commencing with the *Mellon* case:

> "* * * The common thread underlying both requirements (a person may not vindicate the constitutional rights of a third party and there must be a case or controversy) is that a person cannot challenge the constitutionality of a statute unless he shows that he himself is injured by its operation. * * *"[1]

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[1]Cf. *Coleman et al. v. Miller,* 307 U.S. 433, 440, 441, 83 L. ed. 1385, 1390; *Willing et al. v. Chicago Auditorium Assoc.,* 277 U.S. 274, 289, 72 L. ed. 880, 884; *Columbus & Greenville Railway Co. v. W. J. Miller,* 283 U.S. 96, 100, 75 L. ed. 861, 865; *Western Pac. Calif. Railroad Co. v. Southern Pacific Co.,* 284 U.S. 47, 51, 76 L. ed. 160, 163; *Champlin Refining Co. v. Corporation Commission of the State of Okla.,* 286 U.S. 210, 238, 76 L. ed. 1062, 1080; *Doremus v. Board of Education,* 342 U.S. 429, 433, 96 L. ed. 475; *A. Magnano Co. v. Hamilton,* 292 U.S. 40, 78 L. ed. 1109, 1113; *U.S. v. Wm. M. Butler, et al.,* 297 U.S. 1, 58, 80 L. ed. 477, 484; *Aetna v. Haworth,* 300 U.S. 227, 239, 81 L. ed. 617, 621; *Perkins v. Lukens Steel Co.,* 310 U.S. 113, 125, 84 L. ed. 1108, 1114; *Singer & Sons, et al. v. Union Pacific Railroad Co.,* 311 U.S. 295, 303, 85 L. ed. 198, 203; *Wm. B. Tyler v. Judges of the Court of Registration,* 179 U.S. 405, 45 L. ed. 252.

(c) United States Court of Appeals decisions.

All of the United States Circuit Court decisions relating to Federal taxpayers have either expressly followed or recognized the *Mellon* rule. A fair cross-section of these are as follows:

Elliott v. White (CCA-DC), 23 F. 2d 997, 998, held that a Federal taxpayer has no legal standing to enjoin the United States Treasurer from disbursing funds appropriated for salaries of Congressional chaplains on the ground that the employment of these men constitutes the establishment of a religion contrary to the First Amendment.

In *Duke Power Co. v. Greenwood County* (CCA-4th), 91 F. 2d 665, 676, a plaintiff attacked the validity of a statute which authorized Federal loans and grants to cities for the construction of public works projects designed to relieve widespread unemployment. At page 676, the Fourth Circuit Court had the following to say about the plaintiff's capacity to maintain the action:

> "* * * While some state courts recognize the right of a taxpayer to enjoin the unauthorized use of public funds, it is well settled in the federal courts that such use of the funds of the United States violates no right of the taxpayer of which he may complain. Frothingham v. Mellon, 262 U.S. 447 * * *."

Wheless v. Mellon (CCA-DC), 10 F. 2d 893, 895. In a suit by a taxpayer on behalf of himself and all other taxpayers similarly situated to set aside a Veterans' Compensation Act on the ground that it

was invalid, the Court had this to say concerning the capacity of a taxpayer to maintain the action:

> "* * * The right of the complainant to bring this suit is based solely upon the claim that because of the act he will suffer injury as a citizen and taxpayer, in common with all other citizens and taxpayers similarly situated, and that he should have 'the right possessed by every citizen to require that the government be administered according to law and that the public moneys be not wasted.' * * * we hold that the complainant below was without standing in the suit, and accordingly, we affirm the decree of the lower court, * * *."

Railway Express, Inc. v. Kennedy, et al., 189 F. 2d 801, 804, 805. In this case the plaintiff sued the Railroad Retirement Board to enjoin it from paying unemployment insurance benefits for days lost by a strike, on the ground, among others, that if such payments are made, plaintiff's taxes will be increased. The Seventh Circuit Court affirmed a lower court's dismissal of the complaint on the ground that the plaintiff has no capacity to maintain the action. In so doing, the Appellate Court stated:

> "* * * It is not sufficient that plaintiff as a member of the public desires a law to be correctly administered. * * * It has been many times held that a taxpayer of federal taxes has no standing to sue to prevent the expenditure of federal funds under a statute which he claims to be unconstitutional, even though such expenditure might possibly result in an increase in the taxes which he will eventually be compelled to pay. Common-

wealth of Massachuetts v. Mellon (Frothingham v. Mellon), 262 U.S. 447, 43 S. Ct. 597, 67 L. Ed. 1078. * * *"

And finally, in *Arkansas-Missouri Power Co. v. City of Kennett, Mo., et al.* (CCA-8th), 78 F. 2d 911, 914, it was again stated:

"* * * We know of no rule of law, however, which permits one indirectly hurt, no matter how seriously, by a government expenditure, to question the power of the government to make it. In fact, the rule is to the contrary. * * *" (*Mellon* case cited.)[2]

This Court, in *Fallbrook Public Utility District v. United States District Court, Southern District Cali-*

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[2]Cf. *U.S. v. Mayor and Council of City of Hoboken, N.J.*, 29 F. 2d 932, 946; *U.S. v. Mellon*, 32 F. 2d 415, 418; *Kansas Gas and Electric Co. v. City of Independence, Kan., et al.*, 79 F. 2d 32, 40; *Greenwood County, S.C., et al. v. Duke Power Co., et al.*, 81 F. 2d 986, 997; *Electrical Securities Corporation v. Commissioner of Internal Revenue*, 92 F. 2d 593; *Fletcher v. U.S.*, 92 F. 2d 713, 714; *Franklin Trust Company v. City of Loveland. Colo., et al.*, 3 F. 2d 114, 116; *Fox Film Corp. v. Trumbull*, 7 F. 2d 715, 728; *Dunn v. Fort Bend County, et al.*, 17 F. 2d 329, 332; *U.S. v. Deming*, 19 F. 2d 697, 698; *Central Trfs. Co. v. Commercial Oil Co., et al.*, 45 F. 2d 400, 402; *United Shoe Machinery Corporation v. Compo Shoe Machinery Corp.*, 56 F. 2d 292, 295; *U.S. ex rel N.Y. Warehouse, Wharf & Terminal Ass'n, Inc., et al. v. Dern*, 68 F. 2d 773, 774; *City of Allegan, Mich. v. Consumers' Power Co.* (6th CCA), 71 F. 2d 477, 481; *Tenn. Valley Auth. v. Ashwander, et al.*, 78 F. 2d 578; *Vick Chemical Co. v. Tho. Kerfoot & Co.*, 80 F. 2d 73, 77; *Burco, Inc. v. Whitworth, et al.*, 81 F. 2d 721, 729; *Dallas Joint Stock Land Bank v. Davis*, 83 F. 2d 322, 323; *Ala. Power Co. v. Ickes*, 91 F. 2d 303, 305; *Ballou v. Kemp*, 92 F. 2d 556, 561; *Wallace v. Ganley, et al.*, 95 F. 2d 364, 366; *Ex parte Cowen*, 98 F. 2d 530, 532; *Ark. La. Gas Co. v. City of Texarkana, Tex., et al.*, 100 F. 2d 652, 654; *Ex-Cell-O Corporation v. City of Chicago* (7th CCA), 115 F. 2d 627, 628; *Tenn. Valley Auth., et al. v. Tennessee Electric Power Co., etc.*, 90 F. 2d 885, 892; *Wm. L. Ross & Co., Inc. v. Road District No. 4 of Shelby County, Tex.*, 27 F. 2d 153, 155.

fornia, So. Div., et al. (CCA-9th), 202 F. 2d 942, 943, defined the term "legal right" and went on to hold that for the Court to grant relief when there was a failure to allege a special injury constituted a violation of the Separation of Powers doctrine:

> "* * * a federal court has no power, *per se,* to question the acts of the executive departments. 'That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act.' (Mass. v. Mellon.) And this principle may only be applied where 'the right invaded is a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege.' (Citing Tenn. Power Co. v. T.V.A.) Thus, petitioner is not the proper party to raise the question of the validity of this expenditure."

All of these authorities follow the *Mellon* rule which prohibits a taxpayer, like the one in the case at bar, to maintain an action to contest the validity of a Federal statute.

(d) A taxpayer, as such, can maintain an action against a municipality and against certain states, Puerto Rico, and Hawaii.

It is conceded, however, that a taxpayer may bring a taxpayer's action, as such, against a municipality. *Crampton v. Zabriskie,* 101 U.S. 601, 25 L. Ed. 1070; *Valentine v. Robertson, et al.* (CCA-9th), 300 Fed. 521, 525. Also, in Puerto Rico, Hawaii, and in numerous state jurisdictions, as appellant points out in his opening brief, a taxpayer has standing to test the

legality of state expenditures therein. *Buscaglia v. District Court of San Juan* (CCA-1st), 145 F. 2d 274; *Castle v. Secretary of Hawaii,* 16 Hawaii 769; *Aiken v. Armistead,* 186 Ga. 368, 198 S.E. 237.

It is admitted that *in these particular jurisdictions,* taxpayers have capacity to maintain an action of this nature. However, the rule is otherwise as far as suits against the United States Government, Territorial Government of Alaska and certain state jurisdictions are concerned.[3]

The next matter to consider therefore, is whether the *Mellon* rule has, in fact, been made applicable to Alaska.

POINT 2.

THE MELLON RULE HAS BEEN MADE BINDING UPON THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA.

On April 29, 1949, this Court handed down its decision in *Sheldon, et al. v. Griffin,* 174 F. 2d 382, 384, and expressly held—without equivocation—that a taxpayer in Alaska had no standing to question the validity of an act of the Territorial Legislature without

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[3]Though a majority of the states do not follow the *Mellon* rule, the following states have held that a taxpayer, as such, has no capacity to enjoin the alleged unlawful expenditures of public monies:

Louisiana: *Sutton v. Buie,* 136 La. 234, 66 So. 956;
New Mexico: *Asplund v. Hannett,* 31 N. Mex. 641, 249 Pac. 1074;
New York: *Schieffelin v. Komfort,* 212 N.Y. 520, 106 N.E. 675;
(New York subsequently enacted a status giving taxpayers a right to enjoin the misapplication of municipal funds—taxpayer still may not enjoin the expenditure of state funds.)
Washington: *Pierce County v. Superior* Ct., 86 Wash. 685, 151 Pac. 108;
Oregon: *Taylor v. Lord,* 28 Ore. 498, 43 Pac. 471.

showing that he suffered some injury personal to himself, which is not common to the general public. In the *Griffin* case, a taxpayer, suing as such, filed action against the executive director of the Territorial Unemployment Compensation Commission alleging that an amendment to the Unemployment Compensation Act was irregularly and illegally passed by the Legislature. On page 384, this Court had the following to say about an Alaskan taxpayers' capacity to question the validity of a Territorial statute:

> "* * * There is nothing in the pleading or proof to indicate that the plaintiff has a particular right of his own to which injury is threatened, or any interest distinguishable from that of the general public in the administration of the law. *To entitle himself to be heard he is obliged to demonstrate not only that the statute he attacks is void but that he suffers or is in imminent danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some remote or indefinite way in common with the generality of people.* Frothingham v. Mellon, 262 U.S. 447, 488, 43 S. Ct. 597, 67 L. Ed. 1078. Cf. also Perkins v. Lukens Steel Co., 310 U.S. 113, 125, 60 S.Ct. 869, 84 L. Ed. 1108; State of Minn. ex rel. Smith v. Haveland County Assessor, 223 Minn. 89, 25 N.W. 2d 474, 174 A.L.R. 544."
> "The judgment is reversed with directions to dismiss the suit." (Emphasis supplied.)

In his brief, appellant attempts to distinguish the *Griffin* case by arguing that no public funds were involved therein and that the challenged statute added nothing to the burden of taxpayers in Alaska. We

have examined the pleadings in the transcript of record in *Sheldon, et al. v. Griffin,* (supra) in order to determine the real issues involved. (No. 12,097 U.S. Court of Appeals for the Ninth Circuit.) Griffin's amended Complaint reads in part as follows: (See pages 11 and 18 of the Transcript in No. 12,097.)

"I.

That plaintiff is now and was at all times herein mentioned a resident citizen and taxpayer of the Territory of Alaska.

* * * * * * *

XXI.

That if the said experience rating credits are issued it will result in a wrongful, *illegal and unlawful loss of funds* of the Territory of Alaska, and without any authority of law, or right, and will be wholly lost to the taxpayers of the Territory of Alaska, and that plaintiff and all other taxpayers of the Territory of Alaska will be irreparably damaged and injured thereby, and all without any possible redress or any plain, speedy or adequate remedy at law." (Emphasis supplied.)

These allegations were denied, therefore putting them in issue. (Transcript of Record in *Griffin* case, pages 35-39.)

The appellant's brief on appeal in the *Griffin* case sets forth six specific grounds of error. The first five were based on the merits and the sixth was predicated upon the contention that the Court has no jurisdiction because the *Mellon* rule was applicable to Alaska,

hence urging the Court to rule that the plaintiff had no capacity to sue. It is clear that this Court reversed Judge Dimond solely on the basis of this sixth point. The case relied upon by the appellants therein under point number six (6) was *Massachusetts v. Mellon (Frothingham v. Mellon)*, supra.

The appellant herein seemingly fails to perceive the basic reasoning underlining the *Sheldon* case. On page 35 of his brief, he summarizes his argument of the preceding four pages, centering around the inapplicability of that case to the case at Bar, with this statement:

> "In short, it seems clear to us that the Court of Appeals in the *Sheldon* case cited *Massachusetts v. Mellon* for a particular point—to show that where there is no justiciable controversy, there can be no suit. *And the Court of Appeals held that a taxpayer shows no justiciable controversy where no added tax burden is involved.* The Court plainly states this point." (Emphasis supplied.)

This italicized statement epitomizes the basic error of the appellant's argument. He correctly states the premise, mainly that the *Mellon* case stands for the proposition that where there is no justiciable controversy, there can be no suit. But the conclusion drawn from this premise, namely, that a taxpayer "shows no justiciable controversy where no added tax burden is involved", is manifestly erroneous. The determination as to whether a case or controversy exists is not dependent upon whether or not there is an "added tax burden involved" but is dependent upon whether

the taxpayer can show he himself is injured differently from all other taxpayers by the operation of the statute. The *Mellon* case and every case thereafter citing it demonstrates that principle. Even though an expenditure might result in an increase in taxes which he is compelled to pay that fact does not give a taxpayer the right to sue. *Arkansas-Missouri Power Company v. City of Kennett, et al.,* (CCA-8th) 78 F. 2d 911, at page 914; *Fallbrook Public Utility District v. United States District Court So. District California, et al.,* (CCA-9th) 202 F. 2d 942, at page 943, and all other cases cited, supra. Moreover, we were unable to find, in a review of the numerous decisions on this subject, any case making the distinction claimed by the appellants to the effect that the *Mellon* rule is only applicable when a tax burden is involved. As a matter of fact, in the *Mellon* opinion at 262 U.S. 487-489, the Supreme Court expressly states that additional taxation is a "matter of public, and not of individual concern."

A cursory examination of the *Sheldon* case discloses that this Court held that no justiciable controversy exists, *not because* there was a failure to show an added tax burden, *but because;* "There is nothing in the pleading or proof to indicate that the plaintiff has a particular right of his own to which injury is threatened, or any interest distinguishable from that of the general public in the administration of the law. * * *" (174 F. 2d 382, at page 384.)

In view of this fact and for the express reason that this Court cited the *Mellon* decision as a basis for its

holding in the *Griffin* case, it is a compelling conclusion that the Federal rule, which up to that time applied to a taxpayer's suit against the Federal Government, was then and there made applicable to an Alaskan taxpayer's suit against the Territorial Government. That this is a valid interpretation of the *Griffin* case and conclusive evidence of this Court's intent *not* to follow the majority of state jurisdictions and the Territories of Puerto Rico and Hawaii is shown, with compelling force, by considering the *Griffin* decision within the context of the following statement made by this Court in 1936 in *Demmert v. Smith,* 82 F. 2d 950, 952 (CCA-9th):

> "At the argument of this case the question was raised as to whether or not a taxpayer could bring an action such as this. The Supreme Court in Massachusetts v. Mellon, 262 U.S. 447, 486, 43 S. Ct. 597, 67 L. Ed. 1078, held that the relation of taxpayer of the United States to the federal government is such that he could not maintain such an action upon his status of taxpayer alone, although recognizing that the interest of the taxpayer of a municipality in the application of its moneys is so immediate and direct as to justify the remedy of injunction to prevent the misuse of public funds. *As to whether or not a taxpayer of Alaska, a territory of the United States, can maintain a taxpayer's suit is a point that need not be decided in this case for reasons already pointed out and we refrain from expressing any option on that question.*" (Emphasis supplied.)

Therefore, between the date the *Demmert* decision was handed down in April of 1936, when this Court per-

mitted the applicability of the *Mellon* rule to an Alaskan taxpayer's suit to pass sub silento, and the date of the *Griffin* decision in April of 1949, the question of whether or not an Alaskan taxpayer had standing to question the validity of a Territorial expenditure was wide open. During this time the so-called majority rule of the state jurisdiction and our sister territories could be urged for consideration upon the Court. However, when the *Griffin* case was decided in April of 1949, this Court closed the question as far as the District Court for the District of Alaska is concerned and expressly and explicitly made the *Mellon* rule applicable to the Territory of Alaska. If the appellant were frank about this matter, he would request the Court to reverse the *Sheldon* case rather than attempt to distiguish it for reasons that lack substance.

In summarizing therefore, it is clear that based upon the pleadings and written arguments in the *Griffin* case, one of the main issues squarely before this Court therein and ultimately decided, was whether or not a taxpayer of Alaska had capacity to enjoin the alleged "wrongful, illegal and unlawful loss of funds of the Territory of Alaska * * *." This Court, as stated heretofore, held that an Alaskan tax payer, as such, could not so sue unless he alleged a direct injury to himself different from that suffered by the generality of taxpayers. This rule is presently in effect in Alaska and will continue to be so unless changed by the Territorial Legislature or this Court reverses the *Sheldon* case.

Appellant makes no attempt to distinguish *Shelton v. Wade,* 130 F. Supp. 212, (Alaska District Court). He is in effect forced to admit that it is on "all fours" with the case at Bar. Faced with this dilemma he contends that Judge George W. Folta, who rendered the opinon, did not understand the *Griffin* case and therefore, erroneously concluded that he was bound by it. In substance, appellant, on page 34-35 of his brief, states that Judge Folta did not: (1) refer to the statement in that case concerning the burden of Alaskan taxpayers, (2) discuss the *Valentine* or *Buscaglia* cases, or (3) discuss or appreciate the vast body of state authorities allowing suits of this type by city, county and state authorities.

The late Judge Folta was a thorough man and was obviously aware of Judge Dimond's opinion in the *Sheldon* case which upheld the validity of a taxpayer's suit in Alaska. However, he recognized the binding effect of this Court's reversal of Judge Dimond and felt constrained to follow it. The following excerpt from Judge Folta's opinion will show that he did not give a hurried opinion. He not only appreciated the divergency of judicial views on the issue but fully understood and appreciated all views. He cited all leading cases and an A.L.R. citation which fully briefed all views including the so-called majority view:

> "* * * The interest which must be shown as a prerequisite to the maintenance of a suit by a taxpayer for injunctive relief is a matter upon which the authorities are divided, Anno. 58 A.L.R. 588. The weight of authority is that the

unlawful diversion of funds by a municipality or state may be enjoined by a taxpayer. However, a minority of the courts supports the view that states should be allowed great latitude in making appropriations and that they may be restrained by a taxpayer only where he is able to show that he will suffer a direct injury. So far as federal funds are concerned, the question was laid at rest by the Supreme Court in *Massachusetts v. Mellon* and *Frothingham v. Mellon,* 262 U.S. 447, in which it was *declared that the doctrine of the separation of powers precluded an examination into the constitutionality of a statute except where the complaining taxpayer suffers, or is threatened with, a direct injury.* In *Griffin v. Sheldon,* 78 F. Supp. 466, Judge Dimond adopted the majority view and, although much could be said in favor of the proposition that every state and territory should be allowed to formulate its own policy, particularly in view of the remote relationship borne by the taxpayer to the federal government as compared with the much closer relationship borne to local government, Judge Dimond's decision was reversed, *Sheldon v. Griffin,* 174 F. 2d 382, on the authority of *Massachusetts v. Mellon,* supra. *Since the plaintiff has not shown that he will suffer any injury that will not be suffered in common by the general public, he has no standing to sue, and hence the decision of the Court of Appeals for this Circut is dispositive of this controversy and requires that the motion for a preliminary injunction be dismissed and the restraining order dissolved."* (Emphasis supplied.)

Surely in view of the above statement from the Court's opinion, it cannot be stated that Judge Folta

did not appreciate the significance of the majority view. The opposite observation is more appropriate, i.e., he fully appreciated all sides and felt constrained as a matter of judicial conscience to follow this Court's decision in *Sheldon v. Griffin,* supra. The apparent reason why neither Judge Folta nor Judge Hodge considered the tax burden statement in the Sheldon cause is easily discernible. As has been heretofore shown, whether or not there was a tax burden makes no difference in determining a taxpayer's capacity to sue. The only relevant matter which these two judges and all Federal judges have been concerned with was whether the taxpayer alleged and proved the statute in question imposed a direct injury on themselves different from that suffered by the generality of taxpayers. The late Judge Folta did not discuss the *Buscaglia* or *Valentine* cases because apparently neither counsel brought them to his attention.

POINT 3.

AN ANALYSIS OF THE COMPLAINT HEREIN FAILS TO DISCLOSE THE EXISTENCE OF ANY ALLEGATION THAT A PARTICULAR LEGAL RIGHT OF THE APPELLANT IS BEING THREATENED WITH INJURY BY THE ADMINISTRATION OF CHAPTER 39, SLA 1955 OR CHAPTER 6, EXT. SLA 1955.

Nowhere in appellant's seven-page Complaint does he allege that he will suffer a direct personal injury different from that suffered by the public generally resulting from the administration of Chapter 39, SLA 1955 and Chapter 6, Ext. SLA 1955. To the contrary, appellant is candid and alleges that he and the general public will suffer "like injury and dam-

age". Paragraph 3, page 2 of the Complaint herein states in part as follows:

> "3. The citizen, resident taxpayers of said Territory number many thousands. Plaintiff and all of said persons are in the same class and are affected by all the matters and things mentioned hereinafter and are subject to *like injury and damage* as the injuries complained of in plaintiff's complaint. * * *" (R. 4.) (Emphasis supplied.)

Under paragraph 8, page 5 of said Complaint, it is alleged:

> "* * * and the payment of said funds for said purpose will greatly increase the taxes which this plaintiff and the other taxpayers of said Territory are obliged to pay to maintain the Government thereof." (R. 8.)

These allegations clearly demonstrate that the appellant is attempting to set aside an act of the Alaska Legislature on the ground that, as a result of its enforcement, the tax burden upon all Alaskan taxpayers, not just upon the appellant alone, will be proportionately increased, i.e., not that he will be hurt any more than the others but all will be allegedly equally injured.

By failing to allege that the enforcement of Chapter 39 and Chapter 6 threatens a violation of a particular legal right of his own, an allegation which he could not, in fact, make, the appellant has brought himself squarely within the *Mellon* rule as made applicable to Alaska by *Sheldon v. Griffin* (supra), and therefore, lacks capacity to maintain the action herein. Not only

does the appellant fail to allege a special type of injury necessary to give him standing to sue, but as stated earlier, and which we think is worthy of repetition, he has alleged that he and the general public will suffer "like injury and damage".

POINT 4.

APPELLANT'S CONTENTION THAT HE, IN FACT, ALLEGED A DIRECT AND SPECIAL INJURY TO HIMSELF, THEREBY ENABLING HIM TO SUE, IS NOT BORNE OUT BY THE RECORD.

Appellant's argument, found on page 45 of his brief, to the effect that his injury is *different* from that suffered by the general public is clearly fallacious.

He contends that taxpayers show injury not suffered in common by the general public once they show that public funds to which they have contributed by taxes are being unlawfully expended.

This assertion demonstrates a lack of appreciation of the *Mellon, Griffin* and *Wade* holdings. When these decisions alluded to the phrase "people generally" (Mellon), or "the generality of people" (Griffin) or "general public" (Wade), they were obviously referring to the generality of taxpayers as a class and not to non-taxpayers such as children, insane persons and people in the penitentiary. This is so clear that a mere cursory examination of these decisions can leave a reasonable person with no other conclusion.

It is apparent that these Courts meant what their plain words imported, i.e., in order to be considered as having capacity to enjoin an alleged illegal expenditure of Federal or Territorial funds, a taxpayer must allege and prove that:

> "* * * he suffers or is in imminent danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some remote or indefinite way in common with the generality of people. * * *" (184 F. 2d, page 384.)

Viewing this matter from an objective point of view, it can hardly be disputed that thousands of Alaskan taxpayers have paid their taxes, and like the appellant, none were injured any differently than he and therefore, neither they nor the appellant have standing to question the constitutionality of the statute herein involved. There must be a "direct injury" to the taxpayer himself as that term is defined by the Supreme Court, before any taxpayer may bring suit. Cf. *Tenn. Electric Power Co., et al. v. T.V.A., et al.,* 306 U.S. 118, 137, 83 L. ed. 543, 549.

Appellant's oft-repeated assertion that Alaska has a small population and therefore should not have the *Mellon* rule made applicable to it, is an argument for a change of policy and has no relevance to the legal principle involved in this litigation. This argument should be addressed to the Territorial Legislature.

The Court's attention is directed to the oft-cited "chain store" case of *State Board of Tax Commissioners v. Jackson,* 283 U.S. 527, 75 L. ed. 1248. There, the taxpayer, a chain store owner, alleged and tried to prove that he was being injured differently than the generality of other taxpayers and particularly that he was being discriminated against in favor of independent store owners. In that case there was no doubt

whatever of the taxpayer's right or capacity to sue for he alleged that he and members of his class were being singled out for a particular type of discrimination. Though he ultimately failed in his endeavor, the jurisdictional question of his capacity to sue was never doubted. However, in the case at Bar, it is impossible for this plaintiff to show that he is being injured differently, if at all, than other taxpayers in Alaska by the appropriation of money to carry both public and non-public school children to the premises of the nearest public school.

ISSUE II.

THE DISTRICT COURT, IN ITS DISCRETION, MAY AWARD ATTORNEY'S FEES TO A SUCCESSFUL LITIGANT AND IT MAKES NO DIFFERENCE IF SUCH A LITIGANT BE THE UNITED STATES OR TERRITORIAL GOVERNMENT.

POINT 1.

UNDER THE AUTHORITY OF THE FEDERAL RULES OF CIVIL PROCEDURE, TERRITORIAL LAW, LOCAL RULE 25 AND JUDICIAL PRECEDENT, THE COURT, IN ITS DISCRETION, MAY AWARD ATTORNEY'S FEES TO THE TERRITORIAL GOVERNMENT THE SAME AS SUCH FEES MAY BE AWARDED TO THE FEDERAL GOVERNMENT.

Section 55-11-51 ACLA 1949 is the pertinent Territorial Statute relevant to the allowance of attorneys fees as costs. Said statute reads as follows:

> "§55-11-51. Compensation of attorneys. The measure and mode of compensation of attorneys shall be left to the agreement, expressed or implied, of the parties; but there may be allowed to the prevailing party in the judgment certain sums by way of indemnity for his attorney fees

in maintaining the action or defense thereto, which allowances are termed costs."

It is noted that under this statute, the "prevailing party" is not restricted to private persons.

Rule 54(d), Federal Rules of Civil Procedure provides:

"Costs. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; * * *."

Local Rule 25 for the District Court of Alaska states:

"Rule 25. Attorney's Fees.

(a) Allowance to Prevailing Party as Costs: (1) Unless the court, in its discretion, otherwise directs, the following schedule of attorney's fees will be adhered to in fixing such fees for the prevailing party as part of the costs of action allowed by law: * * *."

That attorney fees may be included as an item of "costs" appears to be admitted by counsel for the plaintiff. See *Pilgrim v. Grant, et al.,* 9 Alaska 417, and compare *Forno v. Coyle* (CCA-9th), 75 F. 2d 692. There is also precedent which holds that the allowance of attorney fees to the prevailing party is *customarily* made in the courts of Alaska, notwithstanding that such allowance is discretionary. *United States v. Breeden, et al.,* (Dist. Ct., Alaska) 14 Alaska 214, 110 F. Supp. 713.

The right of the Territory to collect attorney fees, (not the Attorney General personally), if granted by the Court, appears heretofore to have been presumed or conceded, in most instances. See *Territory of Alaska v. Alaska Metals and Powers,* A-7044 (Dist. Ct., 1st Div.); *Territory of Alaska v. Katherine S. Fletcher,* A-7124, (Dist. Ct., 1st Div.); *Territory of Alaska v. Paul Peringer,* A-7023, (Dist. Ct., 1st Div.); *Ryker v. Ryker,* Uniform Support Action, A-9206, (Dist. Ct., 3d Div.); *March v. March,* Uniform Support Action, A-9160, (Dist. Ct., 3d Div.); *Smith v. Patrick,* Uniform Support Action, A-9823, (Dist. Ct., 3d Div.); *Arthur v. Arthur,* Uniform Support Action A-10, 120, (Dist. Ct., 3d Div.); *Proulx v. Proulx,* Uniform Support Action, A-10, 521, (Dist. Ct. 3d Div.); and *Long v. Long,* Uniform Support Action, A-9457, (Dist. Ct., 3d Div.).

In the case of *State of Missouri v. State of Illinois, et al.,* 202 U.S. 509, 50 L. ed. 1160-1161, Illinois was authorized to collect certain costs including "Solicitors' fees." The eminent Supreme Court Justice Holmes premised his view principally on the assertion, that "* * * there is no reason why the plaintiff should not suffer the usual consequences of failure to establish its case." (Page 600.) There is no discernable reason herein why appellant, who also failed to establish his case, should be treated any differently than other suitors who fail merely because he chose to sue the Territory.

In the *State of North Dakota v. State of Minnesota,* 263 U.S. 583, 68 L. ed. 461, the Supreme Court per-

mitted the State of Minnesota to recover costs taxed against the State of North Dakota. The opinion refers to numerous cases wherein several states were allowed to recover funds necessary to conduct the litigation.

If the Court determines that the Territory is not entitled to receive attorney fees because its legal officers are salaried personnel, it must necessarily apply the same rule of reasoning to attorneys employed by the United States Department of Justice, a Federal Agency, in that the latter are also "salaried officers." Professor Moore in Volume 6 of his Treatise on "Federal Practice", pages 1339-1340, discusses the right of the United States to recover costs as follows:

> "§54.75. Costs For and Against the United States, its Officers and Agencies; Governmental Corporations. Blackstone stated the general common law rule regarding the sovereign and costs as follows:
>
> > 'The king (and any person suing to his use) shall neither pay nor receive costs; for, besides that he is not included under the general words of these statutes, as it is his prerogative not to pay them to a subject, so it is beneath his dignity to receive them.'
>
> "The United States seems never to have had any kingly dignity preventing it from recovering costs; although it has, in general, followed the kingly prerogative against paying costs. In *Pine River Logging Co. v. United States,* the Court stated the general doctrine in this manner:
>
> > 'While the rule is well settled that costs cannot be taxed against the United States, the rule is believed to be universal, in civil cases at least,

> that the United States recover the same costs as if they were a private individual.'
>
> "If the United States is the prevailing party it is, pursuant to Rule 54(d), entitled under the general principle of that Rule to costs as of course, 'unless the court otherwise directs', which gives the district court discretion to vary the general principle: except that an express provision in a statute of the United States or in the Federal Rules is to control. Thus under Rule 71A, which governs actions for the condemnation of property under the power of eminent domain, although the United States be the prevailing party, it is not entitled to costs."

And see Volume 3, *Federal Practice and Procedure,* (Barron and Holtzoff), page 29.

In *Solomon v. Welch* (D.C., California 1949), 28 F. Supp. 823, the defendant, a Collector for the Bureau of Internal Revenue, sought attorney fees, although represented by attorneys of the Federal Government. The Court permitted the recovery saying:

> "Finally it must be assumed that those who drafted this new rule 54(d) knew the law which had prevailed prior to the adoption thereof. Had they intended to prohibit the allowance of costs to an officer of the United States, in whose favor a judgment had been rendered, they could easily have so declared. Instead, such new rule expressly states: 'Except when express provision therefor is made either in a statute of the United States or in these rules, *costs shall be allowed as of course to the prevailing party* unless the court otherwise directs. * * *" (Emphasis supplied.)

> "It is conceded that there is no express provision either in a statute of the United States or in these new rules which excepts the present case from the general rule that 'costs shall be allowed as of course to the prevailing party.' Likewise in the action at bar the court has not otherwise directed. On the contrary, the judgment entered herein expressly awards costs to the defendant.
>
> "Hence we conclude that the defendant is entitled to recover all such costs as would be awarded to any prevailing party."

No valid distinction is suggested why a different rule pertaining to costs as applied to the United States and its public officers should exist when the Territory of Alaska or the public officials thereof are made party-litigants to a lawsuit. The taxpayers of the Territory should be equally benefited and "indemnified" as are the taxpayers of the United States when the Federal Government collects costs. No provision in either the United States Code or the Alaska Code was found forbidding the Territory from collecting costs, including attorney fees, from an opposing party. Cf. Section 55-11-51 ACLA 1949.

In passing, it is pointed out that nowhere in appellant's brief does he attempt to explain how his contention that the Territory should not be awarded attorney fees can be justified in the face of the fact that the United States Government is allowed attorney fees as a matter of course.

It is submitted that the practice which has existed for a period of years both as to the Federal Govern-

ment and the Territory should not now be set aside. Considerable valuable time was spent by the attorneys for the Territory in preparing and researching the above entitled case which otherwise could have been applied to the collection of revenue or matters of far more importance.

POINT 2.

APPELLANT'S CONTENTIONS THAT: (1) THE COURT, IN ITS DISCRETION, SHOULD DENY ATTORNEY'S FEES TO THE TERRITORY, (2) THE TERRITORY IS NOT A "PARTY", AND (3) DEFENDANTS ARE SALARIED OFFICIALS AND NOMINAL DEFENDANTS ONLY AND HENCE, NOT ENTITLED TO ATTORNEY'S FEES, ARE UNTENABLE.

Counsel for the appellant advances the following arguments why the Territory should not be awarded attorney's fees:

(1) That the Court in its discretion should deny attorney fees to the Territory of Alaska;

(2) That the Territory of Alaska is "not a party" to the action; and

(3) That the defendants are nominal party-defendants only, salaried officials of the Territory and have not incurred any personal expense.

Regarding Contention No. 1.

As stated above, the general rule is "that costs should be allowed as of course to the prevailing party unless the Court otherwise directs", Rule 54(d), F.R.C.P., and in Alaska, the prevailing party is customarily allowed attorney fees. *United States v. Breeden, et al.* (supra). It was in the discretion of the District Court to award attorney fees and so long

as such fees are not unreasonable, they should not be set aside.

Regarding Contention No. 2.

Ofttimes actions are brought against Territorial officers which are actually against the Territory itself. *Pacific American Fisheries v. Territory,* 7 Alaska 147. The material fact in determining whether the suit against a public officer or officers is one against the Territorial Government depends not on the character of the defendant's office but on the nature of the suit or of the relief demanded. See 86 C.J.S., 646, *Territories,* Section 38. The relief sought in plaintiff's complaint is to enjoin the defendants, public officials, from performing certain functions relating to the office they hold. The prayer does not seek to enjoin individual acts of these officers, personal in nature, but rather acts which directly relate to the ordinary duties of their office. The action is, in fact, against the Territory of Alaska.

The Attorney General of the Territory of Alaska is the legal advisor "for the Treasurer" and "other officers of the Territory". See Section 9-1-5, ACLA 1949. As such, he has the obligation of representing these persons in all legal matters and necessarily any monies collected for attorney fees must be transmitted to the Attorney General's employer, the Territorial Government.

Even assuming plaintiff's contention that the action is not against the Territory but against certain "public officials", the case of *Solomon v. Welch*

(supra), clearly authorizes recovery of attorney fees by a public officer, it being presumably recognized that such monies would be held in trust for and paid over to the government they represent.

Regarding Contention No. 3.

The discussion in the preceding paragraph would likewise apply herein. The fact that a public officer is salaried should not preclude the employing sovereign from recovering costs. The taxpayers of Alaska should be indemnified for the time these officials were required to devote towards this matter which could otherwise have been employed in more pressing office business.

Nor is there any validity in plaintiff's argument that to allow the Territory reimbursement or indemnity for the public expenses involved in effect is an "assessment of a penalty against the plaintiff taxpayer." The cost, solely attorney fees, being sought herein is not requested as a punishment but only as a recovery of a portion of the over-all expenses incurred by the Territory in this action.

The Territorial Treasurer, et al., as "nominal party defendants".

It is inconceivable how the plaintiff could maintain an action against only "nominal party defendants" when he specifically sought to enjoin their actions insofar as they attempt to perpetuate the provisions of Chapter 39 of the Session Laws of Alaska, 1955. Paragraph 10 of his Complaint reads as follows:

> "10. Said intention and acts of defendants to enforce and implement said legislation by paying

out public money for the transportation of pupils to sectarian and denominational schools will injure and take from plaintiff and the other taxpayers of said territory their said property and property rights, and will cause him and them material and irreparable loss."

CONCLUSION.

For the reasons above stated the Court is respectfully requested to affirm the lower Court's decision that appellant has no capacity to sue and the Territory is entitled to attorney fees.

Dated, Juneau, Alaska,
October 5, 1956.

J. GERALD WILLIAMS,
Attorney General,
EDWARD A. MERDES,
Assistant Attorney General,
HENRY J. CAMAROT,
Assistant Attorney General,
Attorneys for Appellees.

(Appendices "A", "B", "C" and "D" Follow.)

Appendices.

Appendix "A"

CHAPTER 39, SESSION LAWS OF ALASKA, 1955.

AN ACT

To promote the public health, safety, and welfare by providing transportation for children attending schools in compliance with compulsory education laws.

(H. B. 40)

Be it Enacted by the Legislature of the Territory of Alaska:

Section 1. The Legislature recognizes these facts:

(a) Attendance at schools for all children between the ages of seven and sixteen years is compulsory, except in those cases where a child, residing more than two miles from his school, is not furnished with transportation.

(b) The health of all children is endangered by requiring them to walk long distances to school in inclement weather; and their safety, also, is endangered in requiring them to so walk to their schools along highways that have no sidewalks.

Therefore, in order to protect the health and safety of all school children in Alaska, and to achieve the objectives of the compulsory education laws of Alaska, this statute is enacted.

Section 2. In those places in Alaska where transportation is provided under Section 37-2-8 ACLA 1949 for children attending public schools, transportation shall likewise be provided for children who, in com-

pliance with the compulsory education laws of Alaska, attend non-public schools which are administered in compliance with Sections 37-11-1, 37-11-2 and 37-11-3 ACLA 1949, where such children, in order to reach such non-public schools, must travel distances comparable with, and over routes the same as, the distances and routes over which the children attending public schools are transported.

Section 3. This Act shall be administered by the Commissioner of Education under the direction and supervision of the Territorial Board of Education, and the total cost of all such transportation shall be paid from funds appropriated for that purpose by the Legislature.

Appendix "B"

CHAPTER 6, EXTRAORDINARY SESSION LAWS OF ALASKA, 1955.

"TRANSPORTATION TO SCHOOLS .....
.....TOTAL $1,250,000.00"
(commingled funds for public and private schools)

Appendix "C"

48 U.S.C.A. §77.

"* * * nor shall any public money be appropriated by the Territory or any municipal corporation therein for the support or benefit of any sectarian, denominational, or private school, or any school not under the exclusive control of the Government; * * *."

Appendix "D"

Rule 25(a) (1) of the New Uniform Rules of the District Court for the District of Alaska reads in part as follows:

"Rule 25. Attorney's Fees.

(a) Allowance to Prevailing Party as Costs: (1) Unless the court, in its discretion, otherwise directs, the following schedule of attorney's fees will be adhered to in fixing such fees for the prevailing party as a part of the costs of action allowed by law: * * *."